UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JOSE A. REYES, individually and on behalf of others similarly situated,

Plaintiff,

-against-

APJ CONTRACTING, INC. and ANTHONY ISOLA,

Defendants.

Case No.:

COMPLAINT

Collective Action and Class Action Complaint

Plaintiff JOSE A. REYES individually and on behalf of other similarly situated employees by and through his attorneys allege against Defendants APJ CONTRACTING, INC. ("APJ" or the "Corporate Defendant") and ANTHONY ISOLA ("Isola" or the "Individual Defendant")(the Corporate Defendant and Individual Defendant are collectively "Defendants") as follows:

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction pursuant to 29 U.S.C. § 201 *et seq.* (Fair Labor Standards Act), 28 U.S.C. § 1337 (interstate commerce), and 28 U.S.C. § 1331 (original federal question jurisdiction). Supplemental jurisdiction over the New York State law claims is conferred by 28 U.S.C. § 1367(a), as such claims are so related in this action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

2. Venue is proper in this District because Defendants conduct business in this district, and the acts and/or omissions giving rise to the claims alleged herein took place in this District.

THE PARTIES

3. Upon information and belief, Defendant APJ is a domestic business corporation previously organized and existing under the laws of the State of New York and maintains its principal place of business at 3911 Franklin Avenue, Seaford, New York 11783.

4. Upon information and belief, at all times relevant hereto, the Corporate Defendant has been a business or enterprise engaged in interstate commerce employing more than two (2) employees and earning gross annual sales over $500,000.

5. Upon information and belief, at all relevant times hereto, Defendants have been and continue to be "employers" engaged in interstate "commerce" and/or in the production of "goods" for "commerce," within the meaning of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203.

6. Defendants constitute an enterprise within the meaning of the FLSA, 29 U.S.C. § 203(r).

7. At all relevant times hereto, Plaintiff was engaged in interstate "commerce" within the meaning of the FLSA.

8. Upon information and belief, Defendant Isola resides in the State of New York and is an owner, manager and/or employee of the Corporate Defendant.

9. Defendants provide excavation services in New York State.

10. Defendant Isola is the principal and, upon information and belief, an officer of APJ.

11. Defendant Isola possesses the authority to hire and fire employees, supervise their work schedules, set their rates of pay and maintain payroll records.

12. In particular, Defendant Isola hired Plaintiff and set his rate of pay.

13. Defendant Isola approves the payroll practices for APJ's employees, including Plaintiff.

14. Defendant Isola possesses operational control over APJ and its employees through his financial control over APJ.

15. Plaintiff has been employed by Defendants to work as a driver and laborer within the last six (6) years.

16. Defendant Isola is engaged in business in the County of Nassau. He is sued individually in his capacity as an owner, officer, employee, and/or agent of the Corporate Defendant.

17. Defendant Isola exercises sufficient operational control over the Corporate Defendant's operations to be considered Plaintiff's employer under FLSA and New York State Labor Law ("NYLL").

18. At all relevant times, Defendants have been Plaintiff's employers within the meaning of the NYLL §§ 2 and 651.

NATURE OF THE ACTION

19. Plaintiff brings this action (a) pursuant to the FLSA and the regulations thereto on behalf of himself and other similarly situated employees who were employed by Defendants within three (3) years before the filing of the instant Complaint; and (b) pursuant to the NYLL (§ 650 *et seq.*) and the New York Commissioner of Labor's Wage Order (the "Wage Orders,") codified at 12 N.Y.C.R.R. 142 *et seq.* on behalf of himself and other similarly situated employees who worked on or after the date that is six (6) years before the filing of the instant Complaint, based upon the following acts and/or omissions which Defendants committed:

i. Defendants' failure to pay overtime compensation required by federal and state law and regulations to Plaintiff, who worked in excess of forty (40) hours per week;

ii. Defendants' failure to pay Plaintiff for all hours worked;

iii. Defendants' failure to timely pay Plaintiff's wages;

iv. Defendants' unlawful deduction from Plaintiff's pay; and

v. Defendants' failure to provide Plaintiff with a wage notice and proper paystubs as required by NYLL § 195.

20. Defendants have knowingly and willfully engaged in a policy, pattern or practice of violating the FLSA and NYLL, as detailed in this Complaint.

21. Defendants had previously been investigated by the United States Department of Labor for failing to comply with the FLSA and were therefore on notice of their obligations under the law.

FACT ALLEGATIONS

I. Defendants' Wage and Hour Violations.

22. At all times relevant hereto, Defendants have committed the following acts and/or omissions intentionally and willfully, with knowledge that they have been violating federal and state laws and that Plaintiff has been and continues to be economically injured.

23. Defendants have maintained a policy and practice to not pay Plaintiff and other similarly situated employees in accordance with federal and New York State law.

24. Defendants maintain a workforce of laborers and other positions, all of whom are paid in violation of federal and New York State laws.

25. Defendants have maintained a policy and practice of failing to compensate Plaintiff and other similarly situated employees for every hour they have worked.

26. Defendants have maintained a policy and practice of failing to pay overtime compensation required by federal and New York State law and regulations to Plaintiff and other similarly situated employees who worked in excess of forty (40) hours per week.

27. Defendants maintained a policy and practice of unlawfully deducting from their employees' pay.

28. Defendants have maintained a policy and practice of failing to provide Plaintiff and other similarly situated employees with wage notices and proper paystubs.

A. Plaintiff's Schedule and Pay.

29. Plaintiff worked for Defendants as a driver and laborer from approximately June 2013 until February 1, 2016.

30. Plaintiff generally worked Monday through Saturday.

31. Plaintiff regularly began work at 5:30 a.m. at Defendants' company shop in Garden City, New York where he and other employees loaded tools and equipment and received work instructions.

32. Plaintiff then drove the company truck or van to job sites in New York City, where he would work until 4:00 p.m. or later.

33. After working on the job site, Plaintiff drove the truck or van back to the company shop in Garden City, New York where he would arrive by 7:00 p.m.

34. Plaintiff also worked on Sundays on some occasions.

35. Plaintiff generally took a lunch break of approximately 30 minutes.

36. Defendants paid Plaintiff $20 an hour initially, which they increased to $22 an hour.

37. Defendants also paid Plaintiff for some of his overtime hours at a rate of time-and-a-half of his regular rate, but failed to pay him for all the hours he worked. Many of Plaintiff's overtime hours went unpaid.

B. Additional Wage Violations Affecting Plaintiff.

1. Notice and Recordkeeping Violations

38. Defendants failed to provide Plaintiff with a wage notice or paystubs in compliance with NYLL § 195.

39. Defendants did not provide Plaintiff with a notice specifying his rate of pay, the basis of pay, allowances (if any) claimed against the minimum wage (e.g., tips, meals, lodging, etc.), or the identification of the regular pay day.

40. Defendants also did not provide Plaintiff with a paystub specifying the pay period, his hourly rate of pay, the regular and overtime hours he worked, or all the other information required under NYLL § 195.

41. Defendants have willfully disregarded and purposefully evaded recordkeeping requirements of the FLSA and NYLL and supporting regulations.

2. Untimely Payment of Wages

42. Plaintiff's job duties required him to perform manual labor.

43. Nevertheless, Defendants regularly paid Plaintiff via checks that bounced.

44. Defendants therefore violated NYLL § 191 by failing to timely pay Plaintiff his wages within seven days of the work he performed.

3. Defendants' Unlawful Deduction From His Wages

45. Defendants also regularly unlawfully deducted from Plaintiff's pay, allegedly to withhold for tax purposes.

46. Defendants, however, upon information and belief, did not remit the tax money to the taxing authority.

47. Defendants' failure to remit the withheld amounts to the taxing authorities is evidenced by the annual IRS W-2 forms that Defendants provided Plaintiff, which reflected an amount significantly lower than the earnings that Plaintiff received during the year.

II. Collective Action Allegations.

48. Defendants' violations of the FLSA and NYLL extend beyond the Plaintiff to all other similarly situated employees.

49. Plaintiff seeks certification of this action as a collective action on behalf of himself, individually, and all other similarly situated current and former employees of Defendants pursuant to 29 U.S.C. § 216(b).

50. Plaintiff's Consent to Sue form is attached as **Exhibit 1**.

51. Upon information and belief, there are at least 40 laborers and other employees performing similar duties who have been denied overtime compensation while working for Defendants.

52. At all relevant times, Plaintiff and others who are and/or have been similarly situated, have had substantially similar job requirements and pay provisions, and have been subject to Defendants' common practices, policies, programs, procedures, protocols and plans of willfully failing and refusing to pay the statutorily required minimum wage for all hours worked, willfully failing and refusing to pay the statutorily required overtime compensation for hours worked in excess of forty (40) per workweek, and willfully failing to keep records required by the FLSA. Plaintiff's claims stated herein are similar to those of other employees.

53. Similarly situated former and current employees are readily identifiable and locatable through Defendants' records. These similarly situated employees should be notified of and allowed to opt-in to this action, pursuant to 29 U.S.C. § 216(b).

III. Class Action Allegations Under Fed. R. Civ. P. 23(b)(3) for Violations of the NYLL.

54. Plaintiff brings this action collectively on behalf of himself and other similarly situated employees who did not receive compensation required by the NYLL in respect to their work for Defendants and who have worked for the Defendants as laborers on or after the date that is six (6) years before the filing of the instant Complaint.

55. Upon information and belief, this class of persons consists of not less than 40 persons, and the class is thus so numerous that joinder of all members is impracticable under the standards of Fed.R.Civ.P.23(a)(1).

56. There are questions of law and fact common to the class, which predominate over any questions affecting only individual members, specifically: whether employment of Plaintiff by Defendants is subject to jurisdiction and wage and overtime requirements of the NYLL.

57. The claims of Plaintiff are typical of the claims of the above-described class in that all of the members of the class have been similarly affected by the acts and practices of Defendants.

58. Plaintiff will fairly and adequately protect the interests of the members of the class, in that his interests are not adverse to the interests of other members of the class.

59. A class action is superior to the other available methods for the fair and efficient adjudication of the controversy under the standards of Fed.R.Civ.P.23(b)(3).

60. Plaintiff brings the second and third claims for relief herein on behalf of himself and all other persons similarly situated as a class action pursuant to Fed.R.Civ.P. 23, in respect to all claims that Plaintiff and all persons similarly situated have against Defendants as a result of Defendants' violations of NYLL.

FIRST CLAIM FOR RELIEF
(Overtime Wage Violations under the FLSA against all Defendants)

61. Plaintiff repeats and realleges all paragraphs above as though fully set forth herein.

62. Throughout the statute of limitations period covered by these claims, Plaintiff regularly worked in excess of forty (40) hours per workweek.

63. At all relevant times hereto, Defendants have had and operated under a decision, policy and plan, and under common policies, programs, practices, procedures, protocols, routines and rules of knowingly and willfully failing and refusing to pay Plaintiff and others similarly situated at one and a half times their regular rate of pay for all hours of work in excess of forty (40) hours per workweek, and willfully failing to keep required records, in violation of the FLSA.

64. Plaintiff seeks damages in the amount of their respective unpaid compensation, liquidated (double) damages as provided by the FLSA, attorneys' fees and costs, and such other legal and equitable relief as this Court deems just and proper.

SECOND CLAIM FOR RELIEF
(Overtime Wage Violations under NYLL against all Defendants)

65. Plaintiff repeats and realleges all paragraphs above as though fully set forth herein.

66. New York law prohibits an employer from permitting an employee to work without paying overtime wages of 150% of his or her regular rate for all hours worked in excess of forty (40) in any workweek.

67. Throughout the statute of limitations period covered by these claims, Defendants knowingly, willfully, regularly and repeatedly failed to pay Plaintiff and others similarly situated at the required overtime rates, one and a half times their regular rate of pay, for hours worked in excess of forty (40) per workweek.

68. As a direct and proximate result of Defendants' willful and unlawful conduct, as set forth herein, Plaintiff and others similarly situated have sustained damages and seek recovery for unpaid wages in an amount to be determined at trial, attorneys' fees, costs, liquidated damages and prejudgment interest as provided by NYLL § 663 and supporting regulations, and such other legal and equitable relief as this Court deems just and proper.

THIRD CLAIM FOR RELIEF
(NYLL Failure to Notify against all Defendants)

69. Plaintiff repeats and realleges all paragraphs above as though fully set forth herein.

70. Pursuant to §195(1) of the NYLL, within ten business days of Plaintiff and other similarly situated employees' hiring, Defendants were obligated to provide them with a notice describing, *inter alia*, their hourly regular and overtime rates of pay.

71. Pursuant to §195(3) of the NYLL, Defendants are obligated to provide Plaintiff and other similarly situated employees with a wage statement, along with their pay, that specified their rate of pay, their hours worked, and the pay period.

72. Defendants failed to provide Plaintiff and other similarly situated employees with a notice or paystub in accordance with §195 of the NYLL.

73. As a direct and proximate result of Defendants' willful and unlawful conduct, as set forth herein, Plaintiff and other similarly situated employees have sustained damages and seek damages in accordance with §195 of the NYLL for each week Defendants failed to provide such notice and paystubs, along with attorneys' fees, costs and prejudgment interest as provided by NYLL § 198 and supporting regulations, and such other legal and equitable relief as this Court deems just and proper.

FOURTH CLAIM FOR RELIEF
(NYLL Failure to Timely Pay Wages against all Defendants)

74. Plaintiff repeats and realleges all paragraphs above as though fully set forth herein.

75. New York State Labor Law § 191 requires that a manual laborer be paid no less frequently than once a week.

76. Defendants unlawfully paid Plaintiff via checks that bounced, leading Plaintiff to receive his pay late.

77. Defendants willfully and intentionally made these untimely payments in violation of the NYLL and supporting Department of Labor Regulations.

78. As a direct and proximate result of Defendants' willful and unlawful conduct, as set forth herein, Plaintiff and others similarly situated have sustained damages and seek recovery for unpaid wages in an amount to be determined at trial, attorneys' fees, costs, liquidated damages and prejudgment interest as provided by NYLL § 198 and supporting regulations, and such other legal and equitable relief as this Court deems just and proper.

FIFTH CLAIM FOR RELIEF
(NYLL Unlawful Deductions Against all Defendants)

79. Plaintiff repeats and realleges all paragraphs above as though fully set forth herein.

80. Pursuant to NYLL §193, it was unlawful for Defendants to deduct from Plaintiff and other similarly situated employees' wages unless the deductions were for their benefit and were authorized in writing by Plaintiff other similarly situated employees.

81. Defendants routinely deducted from Plaintiff and other similarly situated employees' wages putatively to withhold for tax purposes in contravention of NYLL §193, but upon information and belief failed to remit the withheld amounts to the taxing authorities.

82. As a direct and proximate result of Defendants' willful and unlawful conduct, as set forth herein, Plaintiff and other similarly situated employees have sustained damage and seek recovery for unlawful deductions in an amount to be determined at trial, attorneys' fees, costs, liquidated damages and prejudgment interest as provided by NYLL § 198 and supporting regulations, and such other legal and equitable relief as this Court deems just and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment awarding:

A. Compensatory Damages in an amount to be determined at trial;

B. Prejudgment Interest;

C. Liquidated Damages pursuant to the FLSA and NYLL;

D. Plaintiff's costs and reasonable attorneys' fees; and

E. Any relief the Court deems just and proper.

Dated: November 21, 2016
New York, New York

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

Exhibit 1

CONSENT TO SUE UNDER FEDERAL FAIR LABOR STANDARDS ACT

I am an individual who was employed by APJ Contracting, Inc. and/or related entities. I consent to be a plaintiff in an action to collect unpaid wages. I agree that I am bound by the terms of the Professional Services Agreement signed by me in this case.

Jose A Rojas
NAME

Jose [signature]
SIGNATURE

5/24/16
DATE